IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 1025-1026.

NATIONAL BROADCASTING COMPANY, INC.,
WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, AND
STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,
Appellants,

v.

THE UNITED STATES OF AMERICA,
THE FEDERAL COMMUNICATIONS COMMISSION, AND
MUTUAL BROADCASTING SYSTEM, INC.,
Appellees.

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

v.

THE UNITED STATES OF AMERICA,
THE FEDERAL COMMUNICATIONS COMMISSION, AND
MUTUAL BROADCASTING SYSTEM, INC.,
Appellees.

On Appeal from the District Court of the United States for the Southern District of New York.

BRIEF OF MUTUAL BROADCASTING SYSTEM, INC., INTERVENOR.

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INTRODUCTORY.

The opinion below, jurisdiction, question presented, and statutes involved are sufficiently set forth in the Government's Brief. For convenient reference (because of the contentions made in Point III of this brief) we have set forth Section 4(i) of Title I, Sections 303, 305(a), 308(b), 312(a), 315, 319(a), and 325 (b) and (c) of Part I of Title

III, Section 502 of Title V, and Section 606(c) of Title VI of the Communications Act of 1934, 47 U. S. C. §§151 *et seq.*, in the Appendix.

STATEMENT.

Mutual Broadcasting System, Inc., intervened in both cases below as a defendant (NBC, R. 431; CBS, R. 455). Mutual participated in the original proceedings before the Commission (Report on Chain Broadcasting; NBC, R. 29 *et seq.*; CBS, R. 49 *et seq.*) and, in addition, after the Commission's Order of May 2, 1941, filed a petition with the Commission requesting certain amendments to the regulations. As a result of this petition, and the ensuing oral argument and briefs, the Commission made its Supplemental Report and Order of October 11, 1941 (NBC, R. 201; CBS, R. 20). No petition, proposal or other request for amendment of the regulations involved has been made by either appellant, their position having been that the Commission had no power or jurisdiction to promulgate any of the regulations.

So far as the proceedings and the facts are relevant to these appeals, they have been adequately summarized in the Statement in the Government's Brief.

The interest of Mutual in the subject-matter is shown in that Statement, and in the Commission's Report on Chain Broadcasting, *supra*. It is shown in greater detail in the affidavit of Fred Weber, its general manager, filed in the court below in opposition to appellants' motions for temporary injunction (NBC, R. 263; CBS, R. 347). The irreparable injury to Mutual, as the fourth and youngest national network organization, which has occurred and is continuing to occur through the maintenance of the restrictive provisions in appellants' network-affiliate contracts; the virtually insuperable obstacles which these restrictive provisions place in the way of the establishment of any new national network by barring access to a large number of important markets in the United States where there are three or less full-time broadcast stations; and the resulting

impairment in the service rendered to the public because of the foreclosing of competition, because of the limitations on the independence of broadcasters, and because of the decreased revenue to many such broadcasters—all are abundantly shown in the Commission's Report (NBC, R. 34 *et seq.*; CBS, R. 46 *et seq.*) and in Mr. Weber's affidavit (see, particularly, NBC, R. 278 *et seq.*, CBS, R. 362 *et seq.*), and indeed, have never been seriously controverted.

SUMMARY OF ARGUMENT.

The order complained of is not a reviewable order under Section 402(a) of the Communications Act for reasons which may be grouped under three headings:

I. The order does not satisfy the primary jurisdiction doctrine formulated in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 139. Resort to the courts in the situation presented by the order "is either premature or wholly beyond their province" (p. 130).

It is *premature* because the order brings no sanctions into play and because it adversely affects such rights as appellants may have only on the contingency of future administrative action, namely, action on applications for renewal of license. The procedural and appeal provisions of the Act applicable to such action, and the regulations governing practice and procedure before the Commission, afford adequate and legally sufficient safeguards for the rights of appellants.

It is *wholly beyond the province of the courts* because the order constitutes only a declaration of policy of legislative character but falls short of being an actual exercise of legislative power. It does not, therefore, present a justiciable controversy.

Appellants have no judicially cognizable right to be protected against such adverse effects as may result from inchoate administrative action of this character.

II. If it be assumed that the order satisfies the primary jurisdiction doctrine, the order is of purely legislative char-

acter and is therefore not reviewable under the statutes involved.

The test of what is "legislative" is not whether the action looks to the future, but whether the action puts into effect a general rule without reference to any particular case. Decisions of this Court seeming to adhere to the former test are, with the exception of one class of cases, readily distinguishable. The exception (treating of orders requiring periodic reports or prescribing uniform accounting systems) is justifiable on other grounds.

Important considerations of public policy are involved. Opinions differ as to the character and extent of supervision (administrative or judicial) which should be provided over the purely legislative determinations of administrative agencies; it is a most difficult problem of political science. Congress should not be deemed in 1913 (or before), or in 1934, to have intended a result equivalent to that sought by the recent highly controversial Walter-Logan Bill. The problem, affecting many agencies and a vast accumulation and annual output of substantive rules and regulations, should be left to Congress to solve.

III. In any event, Section 402(a) does not extend to the purely legislative determinations of the Federal Communications Commission under Title III of the Communications Act.

The Urgent Deficiencies Act has been held not to extend to certain orders, even though final in character. *United States* v. *Griffin*, 303 U. S. 226. It is a matter of the intent of Congress.

Section 402(a) should be limited (1) to those orders under Title II of the Act which are analogous to reviewable orders of the Interstate Commerce Commission, and (2) to those orders under Title III which are quasi-judicial and not subject to Section 402(b). This is supported by evidences of the intent of Congress in the legislative history of the Act and in the provisions of Title III; by the history and contents of the Radio Act of 1927, which was

taken over almost verbatim in Title III, and the omission of the Radio Act of 1927 to provide for any judicial review of such legislative determinations; by the experience of some 15 years under that Act and under Title III, during which administrative action on applications and judicial review under Section 402(b) has proved an adequate method of testing the Commission's assertions of regulation-making authority; and by the nature, wide variety and importance of the regulations which the Commission is authorized to promulgate, together with the large number of persons affected.

ARGUMENT.

I.

The Order Complained of is not a Reviewable Order Because it Does Not Satisfy the Test of the Primary Jurisdiction Doctrine.

In general, we agree with the contentions made in the Govment's Brief: "these suits are premature because the regulations have no immediate effect but are mere declarations of policy to be applied in future administrative proceedings." We agree, also, with the position that "the conventional requisites of equity jurisdiction are not present"[1] and that no court, whether a statutory court under the Urgent Deficiencies Act or a single judge sitting in equity, would have jurisdiction, either at this time or at any time as long as the regulations are maintained in their present form as mere declarations of policy. We do not agree with the apparent concession that a purely legislative determination, particularly such a determination under Title III of the Communications Act, is reviewable if it satisfies other tests, and shall discuss this matter separately under Points II and III of this brief.

The facts and circumstances showing that resort to the courts in the instant cases was "either premature or wholly

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[1] *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 132.

beyond their province," and that the order complained of does not satisfy "the primary jurisdiction doctrine"[2] are reviewed at length in the Government's Brief, and need only be summarized:

1. The phraseology of the Commission's order (simply adopting the regulations), and of the regulations revealing each on its face that it is simply a declaration of policy to be applied in future administrative proceedings, namely, proceedings under Section 309(a) of the Communications Act with respect to applications for renewal of license (NBC, R. 127, 213, 217; CBS, R. 17, 32), confirmed by the express language of the Commission's Report of May 2, 1941 (NBC, R. 121; CBS, R. 141).

2. The assurance afforded by the express language of Section 309(a) that any future administrative proceedings must include notice and a full and fair hearing on the quasi-judicial model, with the right to intervene accorded to interested parties both by necessary implication of the statute and by the Commission's regulations, before any declaration of policy contained in the order can possibly achieve any legal effect, and with the right to petition for rehearing under Section 405 of the Act.

3. The adequacy of the judicial remedy afforded both to the applicant and to any interested intervenor by Section 402(b), in the event the declaration of policy is applied and the renewal application is denied.

4. The assurance afforded by the Commission's Minutes of October 31, 1941 (NBC, R. 379; CBS, R. 453), that any renewal applicant desiring to contest the validity of the regulations, *or the reasonableness of their application to his particular station*, will be protected against injury pending the proceedings and appeal, and even against ultimate loss of license.

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[2] *Rochester Telephone Corp.* v. *United States, supra*, pp. 130, 139.

5. The certainty that there will be future administrative proceedings in which National and Columbia will have full opportunity to intervene and to be heard both before the Commission, the United States Court of Appeals and, on certiorari, this Court—due to the fact that at least two licensees (appellants Woodmen of the World and Stromberg-Carlson[3]) will surely desire to contest the validity of the regulations, or the reasonableness thereof as applied to their stations, together with the inherent probability that other licensees, affiliates of both National and Columbia, will elect to do likewise.

Appellants' miscellaneous contentions bearing on the foregoing have been adequately discussed in the Government's Brief.

The relevant considerations and authorities have been so recently and so thoroughly canvassed in *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, that it is unnecessary to discuss the cases at length. After enumerating the three categories in which this Court's prior decisions involving the "negative order" doctrine fall, this Court (through Frankfurter, J.) said:

> "In group (1) the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province. Thus, orders of the Interstate Commerce Commission setting a case for hearing despite a

[3] In the complaint, these appellants alleged that the regulations would result in "loss of revenue * * * in an amount in excess of $100,000 per year each" (NBC, R. 12). In affidavits filed in the court below, they amplified the allegations of apprehended irreparable injury (NBC, R. 254, 258).

challenge to its jurisdiction,[5] or rendering a tentative[6] or final valuation[7] under the Valuation Act, although claimed to be inaccurate, or holding that a carrier is within the Railway Labor Act and therefore amenable to the National Mediation Board, are not reviewable.[8]

"The governing considerations which keep such orders without the area of judicial review were thus summarized for the Court by Mr. Justice Brandeis in denying reviewability of a 'final valuation' under the Valuations Act [March 1, 1913, 37 Stat. at L. 701, chap. 92, 49 U. S. C. A. §19a]: 'The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation.' *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309, 310.

"Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article 3 of the Constitution by what is implied from the grant of 'judicial power' to determine 'Cases' and 'Controversies,' Art. 3, § 2, U. S. Constitution.[9] Partly they are an aspect of the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been

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"[5] *United States* v. *Illinois C. R. Co.*, 244 U. S. 82. Compare *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375."

"[6] *Delaware & H. Co.*, v. *United States*, 266 U. S. 438."

"[7] *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299."

"[8] *Shannahan* v. *United States*, 303 U. S. 596; compare *Shields* v. *Utah Idaho C. R. Co.*, 305 U. S. 177, 182-184, *ante*, 170."

"[9] *Hayburn's Case*, 2 Dall. 409, is the symbol for considerations which limit the constitutional power of the federal courts, though that case itself never reached adjudication. See, also, *United States* v. *Ferreira*, 13 How. 40; *Muskrat* v. *United States*, 219 U. S. 346."

loath to authorize review of interim steps in a proceeding[10]'' (pp. 130-131).

After analyzing the other two categories, this Court continued:

> ''From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked[22]'' (p. 139).

To the cases cited in the foregoing may be added the following unsuccessful attempts to secure review under the Ur-

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''[10] Prior to § 7 of the Act of March 3, 1891, authorizing an appeal to the Circuit Court of Appeals from a decree granting a preliminary injunction, review in a case not involving a final judgment was unknown in the federal judicial system, except insofar as it was present in the practice of certification introduced by § 6 of the Act of April 29, 1802. See *United States* v. *Bailey*, 9 Pet. 267. For state court decisions the requirements for finality of the original Judiciary Act have been adhered to. Section 237, Judicial Code, as amended, 28 U. S. C. A. § 344. Review of action of the federal district courts not involving final judgments can be had only in a limited class of cases dealing with interlocutory injunctions, receiverships, and criminal appeals. Sections 129 and 238 of the Judicial Code as amended, 28 U. S. C. A. §§ 227, 345. This Court, however, may take jurisdiction on certiorari before the appellate jurisdiction of the circuit court of appeals is exhausted.''

''[22] See also, e. g., *Baltimore & O. R. Co.* v. *United States*, 215 U. S. 481; *Robinson* v. *Baltimore & O. R. Co.*, 222 U. S. 506; *United States* v. *Pacific & A. R. & Nav. Co.*, 228 U. S. 87; *Texas & P. R. Co.* v. *American Tie & Timber Co.*, 234 U. S. 138; *Northern P. R. Co.* v. *Solum*, 247 U. S. 477; *Director Gen.* v. *Viscose Co.*, 254 U. S. 498; *Dayton-Goose Creek R. Co.* v. *United States*, 263 U. S. 456; *Western & A. R. Co.* v. *Georgia Pub. Serv. Commission*, 267 U. S. 493; *Midland Valley R. Co.* v. *Barkley*, 276 U. S. 482; *Railroad Comrs.* v. *Great Northern R. Co.*, 281 U. S. 412. The doctrine has been given general application, e. g., *United States Nav. Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Compare, also, *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.''

gent Deficiencies Act because of the lack of finality in the Commission's order, *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522, and *Brooklyn Eastern District Terminal* v. *United States*, 28 F. 2d. 634, or because the order, though final, was not intended by Congress to be within the scope of the judicial review provided, *Great Northern R. Co.* v. *United States*, 277 U. S. 172, and *United States* v. *Griffin*, 303 U. S. 226. See also *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401.

Other cases to the same effect, arising in equity but not under the Urgent Deficiencies Act, where relief was denied because prematurely sought, include *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 616-7, aff'g 16 F. Supp. 575; *P. F. Petersen Baking Co.* v. *Bryan*, 290 U. S. 570, 575-6; *Porter* v. *Investors Syndicate*, 286 U. S. 461, 468; and *John P. Agnew & Co.* v. *Hoage*, 99 F. 2d. 349, 351. Particularly conclusive against the right of appellants Woodmen of the World and Stromberg-Carlson (in No. 1025) to relief under Section 402(a) when a plainly adequate remedy is available under Section 402(b) are *Black River Valley Broadcasts, Inc.* v. *McNinch, et al.*, 101 F. 2d. 235 (App. D. C.), cert. den. 307 U. S. 623; *Monocacy Broadcasting Co.* v. *Prall et al.*, 90 F. 2d. 421 (App. D. C.); *Sykes et al.* v. *Jenny Wren Co.*, 78 F. 2d. 729, 732 (App. D. C.), cert. den. 296 U. S. 624.

As was stated by this Court in *Highland Farms Dairy, Inc.* v. *Agnew, supra* (p. 616),

> "One who is required to take out a license will not be heard to complain, in advance of application, that there is danger of refusal. *Lehon* v. *Atlanta*, 242 U. S. 53, 56; *Smith* v. *Cahoon*, 283 U. S. 553, 562. He should apply and see what happens."

To the same effect, see *Porter* v. *Investors Syndicate, supra*, p. 468. Similarly, a person aggrieved by a regulation of the Commission should seek relief (as Mutual did successfully in this very proceeding) by applying to the Commission. *Red "C" Oil Mfg. Co.* v. *Board of Agriculture*, 222 U. S. 380, 394-5; *P. F. Petersen Baking Co.* v. *Bryan*, 290

U. S. 570, 575-6. The Commission's rules and regulations contemplate, and expressly provide for, petitions by any person for revision or modification of any of its rules and regulations and, in appropriate cases, for hearings on such petitions. Rule 1.72(c).

Under this heading we are concerned primarily with the fact that appellants' suits were premature. Even, however, were the suits to be regarded as not vulnerable because of prematureness alone, they would still be defective in that

> "resort to the court in these situations is * * * wholly beyond their province."[4]

In part, this is because, to the extent the regulations are final, they are purely legislative (a matter discussed under Point II below), and, to the extent they fall short of being legislative, they constitute statements of governmental policy with which the courts will not interfere. In *United States* v. *Los Angeles & S. L. R. Co., supra*, this Court said,

> "No basis is laid for relief under the general equity powers. The investigation was undertaken in aid of the legislative purpose of regulation. In conducting the investigation, and in making the report, the Commission performed a service specifically delegated and prescribed by Congress. Its conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction" (pp. 314-5).

As stated in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324 (Hughes, C. J.),

> "The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons com-

[4] *Rochester Telephone Corp.* v. *United States, supra*, p. 130.

> plaining. The judicial power does not extend to the determination of abstract questions. *Muskrat* v. *United States*, 219 U. S. 346, 361; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70, 74; *Willing* v. *Chicago Auditorium Asso.*, 277 U. S. 274, 289; *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 262, 264" (p. 324).

See also *New Jersey* v. *Sargent*, 269 U. S. 328; *New York* v. *Illinois*, 274 U. S. 488; *United States* v. *West Virginia*, 295 U. S. 463, 474, and *Arizona* v. *California*, 283 U. S. 423, 462, cited in the same opinion; the dissenting opinion of Brandeis, J., in *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 610; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 355; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. In *Electric Bond & S. Co.* v. *Securities Exchange Commission*, 303 U. S. 419, this Court stated (Hughes, C. J.),

> "Defendants are not entitled to invoke the Federal Declaratory Judgment Act in order to obtain an advisory decree upon a hypothetical state of facts" (p. 443).

See also *Carolina Aluminum Co.* v. *Federal Power Commission*, 97 F. 2d 435 (C. C. A. 4).

If, notwithstanding the safeguards afforded by later administrative proceedings, there is a possibility that, pending the contests over the wisdom or legality of the Commission's ultimate application of its announced policy, a measure of injury will result to appellants, it is at best conjectural and of a character not properly the subject of judicial cognizance. Insofar as the regulations operate within the sphere of regulatory authority, the network organizations cannot obstruct such regulatory activity on the basis of their private contracts. *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467; *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253; *Avent* v. *United States*, 266 U. S. 127; *United States* v. *Michigan Portland Cement Co.*, 270 U. S. 521; *Continental Illinois National Bank & Trust Co.* v. *Chicago Ry. Co.*, 294 U. S. 648, 680; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379; *Olsen* v. *Nebraska*, 313 U. S. 236,

and *The Assigned Car Cases*, 274 U. S. 564. Incidental effects resulting from administrative action frequently do not constitute injury. *United States* v. *Los Angeles & S. L. R. Co., supra*, p. 314; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 47-8; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 125.

The cases cited by appellants are not apposite. *None* of them deals with a mere declaration or announcement of policy, much less with a declaration or announcement which, if and when it is applied, may be fully tested in an adequate quasi-judicial proceeding required by statute, which proceeding, in turn, is subject to judicial review provided by statute. *All* of them have to do with orders which were immediately operative with adverse effect on the rights of the parties complaining, independently of any contingency of future administrative action. Such a case was *Powell* v. *United States*, 300 U. S. 276. By the order of the Interstate Commerce Commission that a certain tariff filed by a railroad be stricken from the Commission's files,

> "The Commission meant to put an end to the tariff in question and the service of the Seaboard according to its terms. The tariff was a rule binding the Seaboard to furnish transportation to and from the fort for charges under other tariffs applicable to and from the junction. The order would eliminate that rule and substitute for it terms of the tariffs applicable prior to its effective date. In effect the order grants the relief sought by the Central's complaint * * *" (p. 285).

In *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156, an order of the Commission refusing to permit a merger of power companies was held to be an "order" as to which the power companies were "aggrieved" under Section 313(b) of the Federal Power Act. The order was clearly the equivalent of the second category held to be within the Urgent Deficiencies Act in *Rochester Telephone Corp.* v. *United States, supra*, and the Court's holding needs no further justification than the reasoning there set forth (pp. 132-4).

There remain but two groups of cases cited by appellants, both groups being patently distinguishable from the instant case, in that the orders involved met the test laid down in the *Rochester Telephone Corp.* case.

One group had to do with orders of the Interstate Commerce Commission putting in effect so-called "rules." *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454; *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80; and *United States* v. *Berwind-White Coal Mining Co.* (*Assigned Car Cases*), 274 U. S. 564. Whether or not the orders involved in these cases may be regarded as truly "legislative" is a question discussed in Point II, A, 2, of this brief, where it is pointed out that in each case hearing was prescribed by statute, elaborate hearings were actually held, to which all carriers affected were made respondents, and the proceedings were considered and tested by this Court on a quasi-judicial basis. Indeed, in the first two of the cases the Commission's orders were found void. There can be no doubt, however, but that all three orders fully met the jurisdictional test of immediate legal effect, not contingent on any future administrative action. *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.*, 258 U. S. 377, and *Corona Coal Co.* v. *Southern R. Co.*, 260 U S. 698, aff'g 266 F. 726, not only do not help appellants' contentions but constitute additional authorities against them on the score of the primary jurisdiction doctrine.

The second group of cases cited by appellants had to do with orders of the Interstate Commerce Commission, and one order of the Federal Communications Commission, prescribing uniform systems of accounts. *American Telephone & Telegraph Co.* v. *United States*, 14 F. Supp. 121, aff'd 299 U. S. 232; *Kansas City S. R. Co.* v. *United States*, 231 U. S. 423, and *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194. Again, whatever difference of opinion there may be as to the legislative character of the orders involved in these cases (discussed in Point II, A, 3),

there can be none as to their immediate and final legal effect. The orders operated directly to deprive the carriers of the right to maintain their existing accounting systems and to require them to establish a particular method of accounting, subject to certain penalties. See also *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612; *Norfolk & W. R. Co.* v. *United States*, 287 U. S. 134, aff'g 52 F. 2d. 967; and *Atlanta, Birmingham & Coast R. Co.* v. *United States*, 296 U. S. 33. On the other hand, where the Commission's action in this field has not reached the stage of immediate legal effect, jurisdiction has been denied under the Urgent Deficiencies Act. *United States* v. *Atlanta, Birmingham & Coast R. Co.*, 282 U. S. 522; *Chesapeake & O. R. Co.* v. *United States*, 5 F. Supp. 7. See also *State Corporation Commission* v. *Wichita Gas Co.*, 290 U. S. 561.

There are no reported decisions under the Urgent Deficiencies Act where a court has taken jurisdiction to review any action even remotely resembling the "regulations" adopted by the order involved in this case. An examination of the some 66 orders of the Interstate Commerce Commission, reviewed by the United States Commerce Court during its existence from February, 1911 to December, 1913, shows no instance of any such case (see Opinions of United States Commerce Court). Examinations of the external aids of statutory construction preceding the adoption of the Commerce Court Act (June 18, 1910), of the Urgent Deficiencies Act (October 22, 1913), and of the Communications Act of 1934 (June 19, 1934), do not support, and by necessary implication completely negative, any Congressional intent to subject administrative action of the sort represented by the Commission's order to judicial review.

II.

The Order Complained of is Not An Order Because of Its Purely Legislative Character.

The majority and the minority opinions in the court below agree in the view that it is no answer to an assertion of jurisdiction under Section 402(a), that the decision challenged is "legislative" in character. The briefs of both appellants predicate their contentions on the assumed correctness of this view, as apparently does also the brief for the Government.

This interpretation of Section 402(a) (and, in turn, of the Urgent Deficiencies Act) is, we submit, too broad and, as applied to the administrative order now in question, is erroneous. If applied to the purely legislative functions of the Federal Communications Commission under Title III of the Communications Act, it would introduce a radical innovation in the relations between the Commission and the courts in the regulation of radio-communication, contrary to the intent and expectation of Congress and greatly extending the area of immediate and automatic judicial interference with the Commission's determinations. While the view claims a measure of support in occasional general expressions in this Court's past decisions, the decisions are, we submit, distinguishable.

For the purpose of this discussion we shall assume that the Commission's order is more than a mere announcement of future administrative action, and that, through the medium of general regulations, it authoritatively commands or forbids certain actions on the part of broadcast station licensees, and at once sets in execution some sanction. In other words, the regulations may be considered on exactly the same footing as if, instead of commencing with the words

> "No license shall be granted to a standard broadcast station having any contract which * * *"

they commenced with the words

> "No licensee of a standard broadcast station shall enter into any contract which * * *."

The conclusion that an order of the Commission, even though purely legislative, may be reviewed under Section 402(a) rests, as we shall attempt to show, on decisions of this Court dealing with orders of the Interstate Commerce Commission and other public utility commissions which, while not purely legislative, were called so. These decisions applied the test of *future operation* as determinative whereas, we submit, the correct test is whether the order puts into effect a *general rule* without reference to any particular case.

Under this latter test (with the possible exception of one class of cases distinguishable on other grounds) the decisions do not support the conclusion. Important considerations of public policy argue against direct judicial interference with purely legislative orders under Section 402(a).

A. Analysis of decisions of this Court wherein the "future operation" test of legislative character was applied.

Earlier decisions of this Court, in which administrative orders have been pronounced "legislative" and have nevertheless been subjected to review, are, it is submitted, all distinguishable on valid grounds.

The administrative orders to which the characterization has been thus applied fall into three classes:

(1) Orders prescribing rates.

(2) Orders adopting "rules" or "regulations" after quasi-judicial proceedings, including notice and hearing, prescribed by statute.

(3) Orders, pursuant to statutory authority, designed to secure information necessary for the performance of the administrative agency's substantive regulatory functions, such as orders prescribing uni-

form systems of accounts and orders requiring periodic reports.

The principal cases in each class will be briefly analyzed.

(1) *Orders Prescribing Rates*

The notion that the distinguishing features of "legislative" and "judicial" are that the former looks to the future and the latter to the past, may be traced largely, although not entirely, to decisions on rate regulation. The leading and most frequently cited case announcing this view is *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226. Among later cases following this precedent are *Honolulu Rapid Transit & Land Co.* v. *Hawaii*, 211 U. S. 282; *City of Knoxville* v. *Knoxville Water Co.*, 212 U. S. 1, 8; *Ross* v. *Oregon*, 227 U. S. 150, 163; *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 305; *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, 289; *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 485-6; *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 440; *Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258, 263; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 318; *State Corporation Commission of Kansas* v. *Wichita Gas Company*, 290 U. S. 561, 569; *Hill* v. *Martin*, 296 U. S. 393, 404; *Morgan* v. *United States*, 298 U. S. 468, 479; *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 50-2; *and Oklahoma Packing Company* v. *Oklahoma Gas & Electric Company*, 309 U. S. 4, 10. See also the dissenting opinion of Mr. Justice Field in *Sinking Fund Cases*, 99 U. S. 700, 761, and *Memphis and Little Rock R. R. Co.* v. *Southern Express Co.*, 117 U. S. 1, 29.

Persuasion to this view, in turn, appears to have been influenced principally by (1) the circumstance that the prescribing of rates for the future may be, and in the past frequently has been, by statute enacted by the legislature, or by ordinance enacted by a municipal body having legislative powers, (2) the further circumstance that previously

the courts had entertained actions for damages by shippers against carriers based on alleged unreasonableness of rates, and (3) decisions of this Court construing the original Interstate Commerce Act as not conferring power on the Interstate Commerce Commission to prescribe rates. The sole prior decisions of this Court cited in support of the view in *Prentis* v. *Atlantic Coast Line Co.* (at p. 226) fall within these descriptions: *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 499, 500, 505; *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439.

1. The circumstance that historically rates have frequently been prescribed by statutes or ordinances enacted by truly legislative bodies is not determinative. Such enactments were usually of a truly legislative character, general in terms, without reference to any particular case, and affecting the rights of individuals in the abstract. *Munn* v. *Illinois*, 94 U. S. 113, 132-4; *Peik et al.* v. *C. & N. W. R. Co.*, 94 U. S. 164, and associated cases; *Baltimore & Ohio R. Co.* v. *Maryland*, 88 U. S. 456, 471; *Dow* v. *Beidelman*, 125 U. S. 680; *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339, 344; and *St. Louis & San Francisco R. Co.* v. *Gill*, 156 U. S. 649. Even in the exceptional cases where enactments by legislative bodies have operated directly and concretely upon individuals, the decisions of this Court can be sufficiently justified on historical grounds, as well as on the well-settled constitutional principle that the Federal Constitution does not require the observance of the separation-of-powers doctrine by the States. Instances of the performance by legislative bodies of what would seem to be judicial functions go back to the enactments involved in such cases as *Calder* v. *Bull*, 3 Dall. 386, and *Maynard* v. *Hill*, 125 U. S. 190. That observance of the separation-of-powers doctrine is not required of the States was recognized in *Prentis* v. *Atlantic Coast Line*, at p. 225, and, of course, in many other cases.

While continuing to characterize the prescribing of rates as "legislative," this Court had, considerably prior to *Prentis* v. *Atlantic Coast Line*, actually applied the criteria

of judicial proceedings to rate-making by administrative tribunals acting under authority delegated by the legislatures. *Chicago, Milwaukee & St. Paul R. Co.* v. *Minnesota*, 134 U. S. 418; *Reagan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362. In cases too numerous to cite, all the procedural demands of due process have been held applicable to rate-making by such tribunals, including prerequisite notice and hearing, findings based on substantial evidence and confined to evidence contained in the record, the making of basic findings, and various others. See cases cited in the dissenting opinion of Mr. Justice Brandeis in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, at pp. 74-5.

This attitude toward the prescribing of rates is to be contrasted with decisions of this Court holding, in effect, that the procedural demands of due process in quasi-judicial proceedings are not applicable to the performance of truly legislative functions by administrative agencies. *Buttfield* v. *Stranahan*, 192 U. S. 470; *United States* v. *Grimaud*, 220 U. S. 506; *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176; *United States* v. *Bush & Co.*, 310 U. S. 371; *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126.

Acceptance of the test of future against past operation has not been without dissent. In *Prentis* v. *Atlantic Coast Line Co.*, Fuller, C. J., in a dissenting opinion, after expressing the opinion that the Virginia State Corporation Commission (which had made the order fixing passenger rates, sought to be enjoined by the carrier) was a judicial court, stated (at p. 237):

> "I cannot see why the reasonableness and justice of a rate may not be judicially inquired into and judicially determined at the time of the fixing of the rate, as well as afterwards."

Harlan, J., concurring in the general observations of the Chief Justice, went further and said (at p. 238),

> "In my judgment, the Virginia State Corporation Commission is, in every substantial sense, a court."

An earlier instance of somewhat the same debate is *Memphis and Little Rock R. R. Co.* v. *Southern Express Co.*, 117 U. S. 1, in which this Court reversed a decree which, *inter alia*, had required the defendant railroad company to carry the plaintiff's express matter "at a just and reasonable rate of compensation." The majority (through Waite, C. J.) said (at p. 29),

> "The regulation of matters of this kind is legislative in its character, not judicial."

Miller, J., dissenting, stated (at p. 33),

> "That the legislature *may*, in proper case, fix the rule or rate of compensation, I do not deny. But until this is done the court must decide it when it becomes matter of controversy."

Field, J., joined in this dissent.

The fact that rate-prescribing orders of the Interstate Commerce Commission, and of the various state public utility commissions, have usually been directed against one or more named individuals does not appear to have been urged as making the orders "judicial" and not truly "legislative" in character. This may be explained by the circumstance that, in view of the usual statutory procedural provisions and this Court's rulings requiring compliance with procedural due process, no issue turned on the characterizations, and there was no point in pressing the contention.

The fallacy in the test announced in *Prentis* v. *Atlantic Coast Line Co., supra*, has however, been the subject of frequent comment. Freund, in *Administrative Powers over Persons and Property*, 1928, states (at p. 15):

> "The line between powers operative from case to case and powers operative by way of general rule is of course a fluid one, since 'general' and 'particular' are

relative terms. Rate-making illustrates the gradations:"

After enumerating six gradations, he proceeds:

> "The U. S. Supreme Court has said that rate-making is a legislative function (211 U. S. 227), having probably in mind the rates from No. 3 on. But for practical purposes, i.e., legislative treatment and administrative procedure, probably only No. 6 is truly legislative."

Similarly, Dickinson, in *Administrative Justice and the Supremacy of the Law*, states:

> "Thus, for example, the act of a public-utilities commission in fixing a rate has been held to be 'legislative' for constitutional purposes.[5] From one aspect of juristic analysis, legislative it no doubt is—that is, from the aspect of its future operation and its applicability to a whole class of cases. But the writ of mandamus is future in its operation, and yet is not for that reason regarded as legislative * * *."

2. The further circumstance that the courts had entertained actions for damages by shippers against carriers based on unreasonableness of rates, and had not entertained actions seeking future relief, is likewise not determinative. As pointed out by Bradley, J., in his dissenting opinion in *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, at page 462,

> "When the rates are not thus determined, (i.e., fixed by the Legislature), they are left to the discretion of the company, subject to the express or implied condition that they shall be reasonable; express, when so

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[5] To the above is appended a footnote which, after citing *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, and *Prentis* v. *Atlantic Coast Line Co.*, *supra*, reads in part: "One reason why our courts have held rate-fixing by a commission to be 'legislative' would seem to be because it is a function which legislative bodies have been in the habit of exercising."

declared by statute; implied by the common law, when the statute is silent; and the common law has effect by virtue of the legislative will."

In awarding damages for the exaction of an unreasonable rate, the court necessarily had first to ascertain what would constitute a reasonable rate for the service rendered. That the available remedy happened to be limited to damages and did not extend to injunction against future continuance of the unreasonable rate (or of any rate in excess of that determined to be reasonable), or to mandamus commanding the establishment for the future of the rate found reasonable, was a matter of historical accident and legislative determination and should not affect the proper classification of the proceeding as "judicial" if the legislature should choose to make the latter remedies also available. In effect, this is what the Congress and the legislatures of the several States have done, by providing the equivalent of injunction and mandamus, namely, cease-and-desist orders against unreasonable rates and orders prescribing rates for the future.

3. The expressions found in this Court's decisions construing the original Interstate Commerce Act, adopting the test of future as against past operation, were unnecessary to the conclusions reached. The decisions were amply justified on the basis of the statutory language involved, under generally accepted principles of statutory construction. *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479.

(2) *Orders Prescribing Various Acts or Practices*

The test of future as against past operation has been extended by this Court from rate-making orders to a number of other kinds of public utility commission orders, future in operation. For example, in *Lake Erie & Western R. Co.*

v. *State Public Utilities Commission of Illinois*, 249 U. S. 422, on complaint by the owner of a grain elevator and coal yard, and after notice and hearing, an order was entered by the Commission against the railroad company directing the railroad company to restore a side track. This order was characterized as "legislative in its nature" (p. 424; see cases there cited). A similar holding was made in *Grand Trunk Western R. Co.* v. *Railroad Commission of Indiana*, 221 U. S. 400, with respect to an order of the state railroad commission directing the installation and use of an interlocking plant at the crossing of two railroads in that state, and apportioning between them the expense of executing the order. But in *Baltimore & Ohio R. Co.* v. *United States*, 264 U. S. 258, however, involving an order of the Interstate Commerce Commission permitting a railroad to acquire certain terminal railroads, this Court, through Brandeis, J., said (at page 263),

> "Whether this order can be described properly as legislative may be doubted. It is clear that legislative character alone would not preclude judicial review. Rate orders are clearly legislative. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226."

This was in response to a contention, rejected by the Court,

> "that this order is not one of those subject to judicial review; and that, if subject to review, it cannot be held void merely because unsupported by evidence" (p. 263).

See also *Southern R. Co.* v. *Virginia*, 290 U. S. 190, 197.

Included in the orders reviewed under the Urgent Deficiencies Act have been some purporting to adopt "rules" of more general character future in operation. Except, however, for cases dealing with orders requiring periodic reports or prescribing uniform accounting systems, which are discussed separately below, the "rules" were subject to a statutory prerequisite of notice and hearing and were considered by this Court on a quasi-judicial basis, somewhat in

the same fashion as it has considered rate-making orders. In effect, the "rules" were affirmative *orders* directed to a number of persons, all of whom were respondents in the proceeding before the Commission. The mere fact that such orders have been entitled, or have been issued in the form of, "rules" or "regulations" would not, of course, confer on them a legislative character not otherwise possessed.

In *United States v. Berwind-White Coal Mining Co., et al.*, (*Assigned Car Cases*), 274 U. S. 564, suit had been brought under the Urgent Deficiencies Act to enjoin and annul an order of the Interstate Commerce Commission prescribing, for all railroads subject to its jurisdiction, an "assigned car rule" governing the distribution of cars among bituminous coal mines in times of car shortage. The order was made under paragraph (14) of Section 1 of the Transportation Act, reading in part—

> "The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this act * * *" (p. 576).

The Commission initiated the proceeding, and made every carrier subject to its jurisdiction a respondent. Many other persons became parties by intervention. After an extended hearing, the Commission concluded that certain existing practices and other existing regulations of carriers resulted in unjust discrimination and were unreasonable. It ordered that the carriers cease and desist from such practices and prescribed the uniform rule in question (p. 572). The persons bringing suit under the Urgent Deficiencies Act had all been parties to the proceeding before the Commission (p. 567).

This Court, through Brandeis, J., stated: "The order here attacked is wholly legislative" (p. 574). It rejected the contention that the Commission did not have authority to prohibit the use of assigned cars by a general rule and, as a matter of statutory construction, held that it did have

such authority. It went on, however, to apply the usual tests of procedural due process, finding "ample evidence to support the Commission's findings," with the following qualification:

> "In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general" (p. 583).

It is to be noticed that the opinion tacitly agrees that the evidence supporting the findings must be within the record, thus distinguishing the proceeding from the purely legislative proceeding involved in *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, under a statute which likewise required a hearing.

In *Chicago, R. I. & P. R. Co.* v. *United States*, 284 U. S. 80, suit had been brought under the Urgent Deficiencies Act to set aside certain rules prescribed by the Interstate Commerce Commission with respect to car-hire settlements. The Commission's order had been made under paragraph (14) of Section 1 of the Transportation Act (p. 91). The Commission had instituted the proceeding; had made all common carriers by railroad in the United States parties respondent; had held elaborate hearings at which a large amount of testimony was taken; and had made two reports. This Court reversed a decree of the lower court dismissing the suit because the Commission's order was "in flat opposition to" one of the findings and resulted in a taking of the use of property without compensation. Stone, J., wrote a dissenting opinion, in which Holmes, J., and Brandeis, J., joined. While the dissenting opinion expressed the view that the judgment of the lower court should be affirmed, it recognized the applicability of the usual tests of procedural due process (p. 117).

In *United States* v. *Baltimore & O. R. Co.*, 293 U. S. 454, suit had been brought under the Urgent Deficiencies Act to set aside an order entered by the Interstate Commerce Commission under the Boiler Inspection Act. The proceeding had been initiated on complaint of two Brotherhoods, praying that the Commission prescribe rules requiring that all steam locomotives be equipped with power reverse gear or other devices, etc. Practically all the railroads of the United States were made respondents. An extensive hearing was held before an examiner, followed by the hearing of elaborate exceptions before a Division of the Commission. Reargument before the whole Commission was denied (pp. 457-8). Section 5 of the original Boiler Inspection Act provided in part—

> "* * * after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the commission requires, shall become obligatory upon such carrier" (p. 460).

After finding that the Commission "was granted the power, not only of disapproving proposed rules, but also of requiring modifications of those in force" (p. 461), this Court, through Brandeis, J., held the Commission's order void because of the complete absence of the basic or essential findings required to support it (pp. 462-4). Section 14(1) of the Interstate Commerce Act

> "does not remove the necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity" (p. 465).

(3) *Orders Designed to Secure Information.*

There remain to be discussed the decisions of this Court involving orders requiring the filing of periodic reports, or prescribing uniform accounting systems. Such orders, we believe, furnish the only instances where the administrative action held to constitute an "order" might, with some show of reason, be characterized as truly legislative, since the ac-

tion on some (but not all) occasions was expressed in the form of "regulations" and in some (but not all) was not preceded by quasi-judicial proceedings.

These cases may, we submit, be distinguished on the grounds (1) that the administrative action in each case was of an ancillary type, designed to secure information to enable the agency to perform its substantive regulatory functions, (2) that, while the action took legislative form, only a limited and definitely known number of persons were subject to its requirements, and (3) that, in any event, the scope of judicial review was ultimately so narrowly confined as to leave little ground for interference with the administrative action.

In a sense, this line of cases goes back to *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, which was the only precedent cited on the question by counsel for the Commission in *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612 (see 55 L. ed. p. 880), and was again cited in the brief filed for the United States in *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194 (see 17 ed. p. 731). In the *Brimson* case, this Court reversed a judgment of the lower court dismissing a petition filed by the Commission invoking the aid of the court in requiring the attendance and testimony of witnesses and the production of documents, books and papers, in a case before the Commission. *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407, 420-1, as later summarized in the *Goodrich* case, through Day, J., (at p. 212),

> "dealt with the authority of the Commission to compel the attendance and testimony of witnesses in cases where complaints had not been filed. The extent to which the Commission might require systems of accounting and reports of corporations subject to the act was expressly left open in the opinion of the court."

In *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission*, *supra*, the Commission's order requiring monthly reports was upheld on the ground (Hughes, J.),

> "To enable the Commission properly to perform its duty to enforce the law, it is necessary that it should have full information as to" (p. 622)

the subject-matter to be regulated.

The same justification was voiced in the *Goodrich* case, *supra*, in which orders of the Commission prescribing a uniform system of accounting and bookkeeping for carriers by water upon the Great Lakes, and calling for annual reports from such carriers, were upheld (Day, J.):

> "If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations, and favoritism, it must be informed as to the business of the carriers by a system of accounting * * *. The object * * * is * * * to be informed concerning the business methods of the corporations subject to the act, that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business" (p. 211).

This reasoning was followed in *Kansas City S. R. Co.*, v. *United States*, 231 U. S. 423 (see pp. 440, 449). This case came before this Court from a decree of the Commerce Court dismissing a petition to enjoin the enforcement of the Commission's regulations relative to the uniform accounting and bookkeeping system prescribed for interstate railway carriers. The decree was affirmed.

In *United States* v. *Atlanta, Birmingham & Coast R. Co.*, 282 U. S. 522, it was held that a passage in a report of the Commission, which specified the maximum amount that a carrier might include in its accounts as representing an investment in a newly-acquired road, and which notified the company that it would be expected to adjust its accounts accordingly, did not amount to an "order" under the Urgent Deficiencies Act. In an earlier stage, the Commission's action had been set aside because taken without hearing. *Atlanta, Birmingham & Coast R. Co.* v. *United States*, 28 F. 2d. 885. A hearing was had thereafter, followed by the

report but no formal order. The controversy came up again in *Atlanta, Birmingham & Coast R. Co.* v. *United States*, 296 U. S. 33, the Commission having in the meantime made an order. This Court affirmed a decree dismissing the suit, saying:

> "This Court is without power to weigh the evidence • • •. The report of the Commission • • • makes it clear that there was ample evidence to support its finding and order" (p. 38).

Norfolk & W. R. Co. v. *United States*, 287 U. S. 134, affirmed a decree of a statutory three-judge court dismissing a petition filed under the Urgent Deficiencies Act (52 F. 2d. 967). The petition sought to enjoin enforcement of "an order pursuant to Section 20 of the Interstate Commerce Act, as amended, requiring the Norfolk & Western Railway Company to carry certain coal mining properties in its accounts as not used in the service of transportation" (p. 137). The order resulted from a proceeding which commenced with a request by the railroad company, followed by an *ex parte* order, and an extensive hearing during which the *ex parte* order was suspended (p. 138). This Court stated (through Roberts, J.):

> "One of the prime purposes of § 20 is and has been since the adoption of the Act of 1887, that the carriers' accounts should be uniform, so as to afford the Commission and the public a basis for comparison of their respective operations" (p. 140).

To a contention that "by virtue of the Commission's mandate an unfair and improper rate base is fixed," this Court replied:

> "But this is to ignore the fact that the order is one touching accounting merely; that before any rate base can be ascertained or any basis of recapture determined the carrier will be entitled to a full hearing as to what property shall be included; and not until the Commission excludes the assets in question from the calculation may the carrier assert the infliction of injury to its

rights of property. A recapture proceeding is now pending against the appellant, wherein full opportunity will be afforded to present any claims with regard to the inclusion in whole or in part of the mining properties in question.

"We are not convinced by the assertion that the necessary effect of classifying the mines as non-carrier properties is to exclude them from consideration as capital in the issuance of securities. We are not, however, required now to decide this question, for the mere accounting classification can conclude neither the Commission nor the appellant upon the hearing of an application under § 20a (2)" (pp. 141-2).

To a contention that procedural due process was lacking, this Court replied:

"The record demonstrates that an adequate hearing was afforded and due weight given to the evidence" (p. 142).

See the opinion of the court below, 52 F. 2d., at page 970. A somewhat similar case was *Chesapeake & O. R. Co.* v. *United States*, 5 F. Supp. 7, in which a statutory three-judge court dismissed a bill of complaint brought under the Urgent Deficiencies Act. While a motion to dismiss the bill for lack of jurisdiction was overruled (p. 9), the court applied, in part at least, the criteria of procedural due process (p. 14). An extensive hearing had been held before the Commission, followed by a report, a reopening for further hearing, and an affirmance of the report (pp. 8-9).

In *State Corporation Commission* v. *Wichita Gas Co.*, 290 U. S. 561, this Court had before it a decree of the District Court in favor of plaintiffs in suits to enjoin the enforcement of certain orders of the state public service commission. One of the orders

"merely directs the distributing companies not to include in their operating expense accounts more than 30 cents per thousand cubic feet for gas furnished by the pipe line company and not to consider any pay-

ments in excess of that price in fixing a rate for domestic consumers" (p. 568).

This Court vacated the decree insofar as it enjoined enforcement of the provisions of that order, saying, in part (through Butler, J.):

> "But the commission's proceedings are to be regarded as having been taken to secure information later to be used for the ascertainment of reasonableness of rates. The order is therefore legislative in character. The commission's decisions upon the matters covered by it cannot be res adjudicata when challenged in a confiscation case or other suit involving their validity or the validity of any rate depending upon them" (p. 569).

This series of cases ends with *American Tel. & Tel. Co.* v. *United States*, 299 U. S. 232, affirming a decree of a statutory three-judge court dismissing a suit brought under Section 402(a) of the Communications Act and the Urgent Deficiencies Act (14 F. Supp. 121). The suit sought to enjoin the enforcement of an order of the Federal Communications Commission prescribing a uniform system of accounts for telephone companies. No question appears to have been raised either in this Court or in the court below as to whether the Commission's determination was an "order" within the meaning of the statutes. There had been proceedings first before the Interstate Commerce Commission and later before the Federal Communications Commission, including hearings (14 F. Supp., at p. 124). The lower court went considerably further than had any previous court in this kind of case and, in holding that the order was not void for lack of a report stating the conclusions and findings of fact by the Commission, pronounced the Commission's action as "legislative," and not requiring findings. The Commission was authorized to act "in its discretion" (p. 124). On appeal, this Court's opinion (Cardozo, J.), did not deal with this aspect of the case and confined itself to application of the principle that

> "What has been ordered must appear to be 'so entirely at odds with fundamental principles of correct accounting' * * * as to be the expression of a whim rather than an exercise of judgment * * *. Then too, in gauging rationality, regard must steadily be had to the ends that a uniform system of accounts is intended to promote" (pp. 236-7).

This was followed by a quotation from the *Goodrich* case, *supra*, to the effect that the object is to be informed so "that it (the Commission) may properly regulate such matters as are really within its jurisdiction" (p. 237).

B. Authorities Supporting the "General Rule" Test of Legislative Character.

In *Douglas* v. *Noble*, 261 U. S. 165, in sustaining the validity of a state dental practice act, this Court recognized another test as to what is "legislative." Discussing the statute's provisions with reference to an applicant's qualifications, this Court stated (through Brandeis, J.):

> "The decision of that fact involves ordinarily the determination of two subsidiary questions of fact. The first, what the knowledge and skill is which fits one to practice the profession. The second, whether the applicant possesses that knowledge and skill. The latter finding is necessarily an individual one. The former is ordinarily one of general application. Hence, it can be embodied in rules. The legislature itself may make this finding of the facts of general application, and by embodying it in the statute make it law" (p. 169).

See also *Highland Farms Dairy, Inc.* v. *Agnew*, 16 F. Supp. 575, 586-7, affirmed, 300 U. S. 608; dissenting opinion of Cardozo, J., in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 448; *State ex rel. State Board of Milk Control* v. *Newark Milk Co.*, 118 N. J. Eq. 504, 179 A. 116; *United States* v. *Ripley*, 7 Pet. 18, 25.

Dickinson, in *Administrative Justice and the Supremacy of the Law*, 1927, formulates the criterion as follows:

> "The essential difference between legislation and adjudication is not that one looks to the future and the other to the past—there is nothing inherent in the judicial process which requires that it should look wholly backward. Nor may the term adjudication properly be limited to cases of controversy between private individuals with an agency of government intervening as arbiter—such a definition would deprive every criminal trial of judicial character. What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity" (p. 20-1).
>
> "Confusion seems to have crept into most of the attempts of the courts to define legislative and judicial power from a failure to keep separate two different distinctions: (1) the distinction between present and future operation; and (2) the distinction between the announcement of a general rule without reference to any particular case, and the application or elaboration of a rule to fit a specific case" (footnote 36, p. 21).

See also Freund, *Administrative Powers over Persons and Property*, 1928, pp. 14-5; Goodnow, *Principles of the Administrative Law of the United States*, 1905, pp. 28-9; Comer, *Legislative Functions and National Administrative Authorities*, 1927, pp. 27-8 (but see p. 47); Port, *Administrative Law*, 1929, Chap. III, pp. 88-119; Blachly and Oatman, *Administrative Legislation and Adjudication*, 1934, p. 1; *Report of Committee on Ministers' Powers*, 1932, pp. 18-20; *Report of the President's Committee on Administrative Management*, Part II, *The Exercise of Rule-Making Power* (by James Hart), p. 319; *Report of Attorney General's Committee on Administrative Procedure* (S. Doc. 8, 70th Cong., 1st Sess. 119)., pp. 97 et seq.

The moment this test is applied and an "order" is found to be truly legislative, entirely different notions of procedure come into play, and the relationship between the legislating agency and the courts undergoes a fundamental change. The legislature may, if it chooses, subject the process to quasi-judicial procedure, but it has done so only rarely. When such procedure has not been prescribed, it has been held unnecessary.

> "Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. * * * There must be a limit to individual argument in such matters if government is to go on." Holmes, J., in *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 445.

See also *Buttfield* v. *Stranahan*, 192 U. S. 470; *Red "C" Oil Manufacturing Co.* v. *Board of Agriculture of North Carolina*, 222 U. S. 380, 394-5; *Opp Cotton Mills, Inc.*, v. *Administrator*, 312 U. S. 126, 145, 152.

Even when a hearing procedure has been prescribed, it has frequently been interpreted as not implying the quasi-judicial model or requiring procedural due process. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176; *United States* v. *Bush & Co.*, 310 U. S. 371, 379-80; compare *Prentis* v. *Atlantic Coast Line Co.*, *supra*, at p. 227.

Appellate review of purely legislative (and partly legislative) determinations has been deemed not within the province of constitutional courts. *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428; *Federal Radio Commission* v. *General Electric Company*, 281 U. S. 464. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134. The scope of judicial control over such determinations, in the few cases in which it has been exercised,

has been confined to exceedingly narrow limits, and the area of administrative finality stops just short of being exclusive.

> "The Court below was clearly right when it observed that if, as the complaint alleged, the standard of safety fixed by the board was unreasonably high, or the method of testing oil unsatisfactory, and not such as was in general use, or the regulations in other respects were unjust or oppressive, it should seek relief by applying to the board of agriculture to modify them. A law cannot be declared invalid because, in the opinion of the court, it does not accord with sound policy. The appeal for redress in such case must be to the lawmaking power" (White, C. J., in *Red "C" Oil Mfg. Co.* v. *Board of Agriculture*, 222 U. S. 380, 394-5).

See also *Buttfield* v. *Stranahan*, 192 U. S. 470, 497; *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479, 484, 487; *P. F. Peterson Baking Co.* v. *Bryan*, 290 U. S. 570, 575-6; *Mississippi Barge Line Co.* v. *United States*, 292 U. S. 282.

C. The Word "Order" Should Not Be Extended to Include Purely Legislative Determinations.

We recognize that governmental machinery should be at hand to provide the necessary check on administrative rule-making of a purely legislative character to keep it within constitutional and statutory limitations. The present question, however, is whether the Urgent Deficiencies Act and Section 402(a) of the Communications Act do, or were intended to, provide this check.

We submit that the scope of the term "order" was intended to be, and should be, confined to (a) final orders entered as the result of proceedings conforming to the quasi-judicial model, prescribed by statute (including notice, hearing, and findings based on substantial evidence within the record), and (b) final orders, whether particular or general in form, designed to secure information necessary to the performance of the administrative tribunal's sub-

stantive regulatory functions. The first of the foregoing may be extended to, but should not go beyond, final orders legislative in nature or form, which are subject to a statutory prerequisite of quasi-judicial procedure.

In support of this construction are the following considerations:

1. The term "order", while admittedly employed in connection with a confusing variety of administrative actions, has not ordinarily been used to denote the determinations of legislatures in enacting statutes, and is most frequently and naturally employed to denote a command or prohibition directed to individuals.

2. As developed above, the decisions of this court over a period of 55 years since the establishment of the Interstate Commerce Commission have only rarely, if at all, extended the scope of direct attack by injunction to legislative determinations.

3. Except for Title III of the Communications Act, the statutes to which the Urgent Deficiencies Act has been made to apply have contained very few delegations of power to make purely legislative determinations; there has usually been a statutory requirement of quasi-judicial procedure.

4. Without prerequisite hearing and a record containing the evidence on which the determination was based, it is difficult to foresee the extent to which the parties will be permitted, or the courts will require, the production of evidence as the basis for ascertaining whether constitutional or statutory limitations have been exceeded, and even then it will be difficult for any administrative agency to bring into court evidence embodying the informed experience, expertness and investigation, on which its regulations may be based.

5. Each legislative determination will be automatically subject to possible review, accompanied by tempo-

rary injunction, in courts anywhere and everywhere over the entire country, at the suit of persons not parties to any proceeding before the Commission (there having been none), with consequent likelihood of conflicting results and hampering delays.

6. Many persons may be encouraged to file petitions with the administrative tribunal, seeking repeal, modification, or relaxation of regulations; it would be only logical that the tribunal's "orders" on such petitions should likewise be brought within the scope of the Urgent Deficiencies Act and Section 402(a), raising difficult questions as to the record to be brought before the court and the scope of review.

7. Presumably the court's decision on review of such a regulation at the suit of one party will not stand in the way of an attack on the regulation by another party when it is sought to be applied to him in a later proceeding of a judicial or quasi-judicial character.

8. Rule-making, that is, the reduction of standards to written, published formulations (as distinguished from the case-to-case method of making law) should not be discouraged by unnecessary obstacles. The process furnishes safeguards of its own, due to the public announcement of a general rule to be uniformly applied.

Other considerations may suggest themselves but the foregoing are sufficient to give pause.

Opinions differ as to the desirability, the method, the proper form, and the extent of review (whether administrative or judicial) of purely legislative determinations by appellate tribunals. It may rightly be regarded as one of the most difficult problems of political science under our scheme of government. The problems are not solely of securing the needed checks on excess of power, but have also to do with uniformity, consistency with the legislative determinations of other administrative and executive agen-

cies, and national policy, not to mention good draftsmanship, proper publicity, and accessibility of rules to those affected.

One of the chief grounds of criticism of the so-called Walter-Logan Bill (H. R. 6324, 76th Cong.), which passed both Houses of Congress but was vetoed by the President early in January, 1941, was that it provided for substantially the same character and measure of review of purely legislative determination as is now claimed for the Urgent Deficiencies Act. *Hearings before Subcommittee of House Committee on the Judiciary*, on H. R. 4236, H. R. 6198, and H. R. 6324, Mar. 17 and Apr. 5, 1939, 76th Cong., 1st Sess. The review provided by the bill was limited as follows (Section 3)—

> "No rule shall be held invalid except for violation of the Constitution or for conflict with a statute or for lack of authority conferred upon the agency issuing it by the statute or statutes pursuant to which it was issued or for failure to comply with section 2 of this Act."

Those who drafted the bill were frankly apprehensive over claims of unconstitutionality, since in the earlier drafts they designated the Court of Claims, and in the later drafts, the United States Court of Appeals for the District of Columbia (both legislative courts), as the reviewing tribunal. *Reports of American Bar Association*, Vol. 62 (1937), pp. 791, 816, et seq., 847, and Vol. 63 (1938), p. 363. The subject of "Judicial Review of Regulations" is ably discussed in the *Report of the Attorney General's Committee*, pp. 115-120, but even the very mild recommendations incorporated in the two bills proposed by the majority and the minority of the Committee with respect to rule-making procedure and (in the minority bill, p. 230) judicial review by declaratory judgment narrowly confined, encountered a storm of objection and criticism from the representatives of federal administrative agencies. *Hearings before Subcommittee of the Senate Committee on the Judiciary*, on S. 674, S. 675 and S. 676, April 2 to July 2, 1941.

Under the circumstances, with the issue still under study by the Congress (although apparently in abatement because of the war), a result equivalent to that sought in the Walter-Logan Bill should not be deemed to have been intended by the Congress when it enacted the Urgent Deficiencies Act of 1913 (or its predecessor statutes), or Section 402(a) of the Communications Act of 1934. The scope of the Urgent Deficiencies Act and of Section 402(a) may, with greater logic and far less hazard, be confined within the limits above suggested, leaving it to the Congress to determine whether and to what extent direct judicial (or administrative) supervision of the rule-making process should be provided.

III.

In Any Event, the Order Complained of is not a Reviewable Order Under Section 402(a) of the Communications Act.

The statutes to which the judicial remedy provided by the Urgent Deficiencies Act has been extended are enumerated in *United States* v. *Griffin*, 303 U. S. 226, 235-6. Without attempting a minute analysis, we know that (except for Title III of the Communications Act) they contain relatively few provisions authorizing the making of rules and regulations of a substantive character. For the most part, the quasi-judicial model set by the original Interstate Commerce Act has been followed, with notice and hearing made prerequisite to administrative action.

It is not surprising that, with this background, the judicial remedy provided by the Urgent Deficiencies Act should have been extended to a few instances of orders which come close to, or fall within, the legislative classification, without serious objection or argument. Such treatment of orders prescribing "rules" for a limited class of persons where the statute makes hearing prerequisite, or where they are of the ancillary character represented by uniform systems of accounts, constitute a reasonable compromise with abstract theory.

Even so, there have been orders which, though of unquestioned finality, have been held not within the scope of the remedy. *United States* v. *Griffin, supra; Great Northern R. Co.* v. *United States,* 277 U. S. 172. See also *American Federation of Labor* v. *National Labor Relations Board,* 308 U. S. 401.

It cannot be assumed, therefore, that the cross-reference to the Urgent Deficiencies Act, contained in Section 402(a) of the Communications Act, conclusively determines the interpretation to be given the section as all-embracing. There may be final orders of the Federal Communications Commission not open to direct attack in the courts under either Section 402(a) or 402(b), depending on the intent of Congress. Evidences of that intent, drawn from legitimate sources under recognized canons of statutory interpretation, are at hand.

> "In construing the Act, this Court concluded that despite the broad language used in the Commerce Court Act, Congress could not have intended to include in this special jurisdiction suits to set aside every kind of order issued by the Commission" (*United States* v. *Griffin, supra,* p. 233).

Pursuing the same method of ascertaining the Congressional intent as that followed in *United States* v. *Griffin, supra,* we are compelled to the conclusion that Section 402(a) does not extend to the purely legislative determinations of the Commission under Title III. The method included examination of the provisions of the Railway Mail Pay Act, its background and legislative history, its purposes, and the character of orders entered under it. It may appropriately be applied to Title III of the Communications Act, which is a statute separate in origin and history from Title II.

A. Orders under Title II of the Communications Act.

Titles II and III of the Communications Act were brought together in 1934, one from the Interstate Commerce Act and the other from the Federal Radio Act of 1927, the former accompanied by Section 402(a) and the latter accompanied by Section 402(b). *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, — U. S. —, April 6, 1942;[6] *Federal Communications Commission* v. *Columbia Broadcasting System, Inc.*, 311 U. S. 132.

The provisions of Title II, entitled "Common Carriers," are obviously reproduced or adapted from the parent statute, the Interstate Commerce Act. They are closely parallel in phraseology, and their purpose is identical (*Federal Communications Commission* v. *Sanders Bros.*, 309 U. S. 470, 474); it may be assumed that Title II comes clearly within the following general description of statutes to which the Urgent Deficiencies Act has been made available—

> "The orders for which review is provided by each of these statutes are like the orders under the Interstate Commerce Commission Act fixing rates payable by shippers" (*United States* v. *Griffin*, *supra*, p. 237).

Where orders of the Interstate Commerce Commission have been held reviewable, similar orders by the Federal Communications Commission under Title II will likewise be reviewable.

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[6] For simplicity, reference will be omitted to other regulatory authority which was centralized by the Act in the Commission, principally certain powers of the Postmaster General under the Post Roads Act of 1866, and the elaborate amendment of May 20, 1937, introducing Part II of Title III entitled "Radio Equipment and Radio Operators on Board Ship."

B. Quasi-Judicial Orders Under Title III of the Communications Act.

There are four kinds of orders under Title III, all quasi-judicial and not legislative in character, which are reviewable under Section 402(a) and not Section 402(b): (1) orders revoking licenses, after notice and opportunity for hearing, under Section 312(a); (2) orders modifying licenses on the Commission's initiative, after notice and opportunity for hearing, under Section 312(b); (3) orders disposing of applications for the Commission's approval of transfers of licenses or construction permits under Sections 310(b) and 319(b); and (4) orders disposing, after notice and hearing, of applications under Section 325(b) and (c) for permits to "export programs." That these are reviewable under Section 402(a) is settled, at least with respect to the first three kinds, by *Scripps-Howard Radio Inc.* v. *Federal Communications Commission, supra;* and that such reviewability was intended by the Congress is evidenced by the references to the statute's legislative history in footnote 3 of the opinion in that case (particularly 78 Cong. Rec. 8825-6). It may be assumed that the same conclusion would be reached with regard to the applications covered by Section 325(b) and (c), similar in character to the applications made appealable under Section 402(b).

That Congress intended to go no further is demonstrated, we submit, by the immediate legislative background of Section 402(a) and (b).

The Communications Act of 1934 had its origin in the filing of companion bills in the Senate and House of Representatives, S. 2910 and H. R. 301, 73d Cong., 2d. Sess. S. 2910 was amended after hearing and introduced as S. 3285 which, as further amended, was enacted into law. The Conference Report accompanying S. 3285 (No. 1918; 78 Cong. Rec. 10988) states with respect to this section (pp. 49-50):

> "The Senate bill (sec. 402), for the purpose of cases involving carriers, carries forward the existing method

of review of orders of the Interstate Commerce Commission, and, in the main, for 'radio' cases carries forward the existing method of review of orders of the Federal Radio Commission; but in 'radio' cases involving affirmative orders of the Commission entered in proceedings initiated upon the Commission's own motion in revocation, modification, and suspension matters, review is to be by the method applicable in the case of orders of the Interstate Commerce Commission. The House provision contains a similar provision as to cases involving carriers, but leaves the present section 16 of the Radio Act of 1927, as amended, applicable in all radio cases. The substitute adopts the Senate provision."

Every implication in the foregoing is that the Congress considered that with exceptions of the character above noted, no order under Title III was to be placed on the same footing as orders under Title II. The committee hearings, the committee reports, and the debates preceding the enactment of the Communications Act of 1934, and, indeed, of all bills relating to radio or to communications introduced prior to 1934, may be searched in vain for the slightest evidence of any intention, desire, or understanding that the legislative determinations of the Commission in regulating radio should or would be made subject to direct judicial review.

C. Legislative Determinations Under the Radio Act of 1927.

Title III of the Communications Act, together with Section 402(b) and scattered sections in Titles I, V and VI, constitutes an almost verbatim reproduction of the Radio Act of 1927, 44 Stat. 1162. Section 303 of the Act, on clauses (f) and (i) of which the Commission's power to make the regulations now in question largely depends, is a verbatim reproduction of Section 4 of the Radio Act, enlarged by the addition of several clauses not relevant to this discussion. See Appendix, *infra*.

Section 16 of the Radio Act of 1927, relating to appeals, was the only provision in the Act for court review. It ac-

corded an appeal to what is now the United States Court of Appeals for the District of Columbia *only to applicants* for construction permit, license, renewal, or modification, *whose applications had been denied;* it also accorded an appeal to that Court *or* "to the district court of the United States in which the apparatus licensed is operated" to any licensee whose license had been revoked. No appeal was accorded to any person adversely affected by the *granting* of an application.[7]

Because of the broad scope of review lodged in the Court of Appeals by the original Section 16, this Court held that the provision "does no more than make that court a superior and revising agency in the" administrative field. *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, 467. The Act failing to make provision for persons adversely affected by the *granting* of applications, or for interested parties to participate in the appellate proceedings, a preliminary injunction was granted against the Federal Radio Commission by the Supreme Court of the District of Columbia and, on appeal, the granting of the preliminary injunction was held not error. *Saltzman et al.* v. *Stromberg-Carlson Tel. Mfg. Co.*, 46 F. 2d. 612 (App. D. C.). See also *Baltimore Radio Show, Inc.* v. *Federal Radio Commission*, Journal of Radio Law, Vol. I, p. 120. Attempts by *applicants*, however, to resort to relief by injunction uniformly failed. *White* v. *Federal Radio Commission*, 29 F. 2d. 113, D. C. Ill. (see *White* v. *Johnson*, 282 U. S. 367); *United States* v. *American Bond & Mortgage Co.*, 31 F. 2d. 448, D. C. Ill. (see 282 U. S. 374 and 52 F. 2d. 318, C. C. A., 7)

In 1930, Section 16 was amended (1) so as to limit the scope of review to one of judicial character, (2) to afford the right of appeal, and the right to participate in appeals, to persons other than applicants, and (3) to confine appeals in revocation cases to the Court of Appeals, 46 Stat. 844.

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[7] The Radio Act contained no provisions corresponding either to Section 312(b) or Section 325 (b) and (c).

There were other changes not relevant to this discussion. In 1934 this amended Section 16 was carried forward almost verbatim into Section 402(b) of the Communications Act *except* that, for reasons already explained, review of revocation orders under Section 312(a) was intentionally placed back in the district courts where it had originally been, and the same provision was made for modification orders under Section 312(b). In the interim between 1930 and 1934 there had been outspoken complaint against the amendment of 1930 because of its forcing licensees to come to Washington on appeals from revocation orders (see, for example, the remarks of Senator White on February 28, 1933, 76 Cong. Rec. 5208).

There were several attempts during this period to resort to the United States District Court in the District of Columbia for injunctive relief but they were unsuccessful. *Sykes et al.* v. *Jenny Wren Co.*, 78 F. 2d. 729 (App. D. C.), cert. den. 296 U. S. 624; *Monocacy Broadcasting Co.* v. *Prall et al.*, 90 F. 2d. 421 (App. D. C.); *Black River Broadcasts, Inc.* v. *McNinch et al.*, 101 F. 2d. 235 (App. D. C.), cert. den. 307 U. S. 623. In the last of these, rendered Nov. 21, 1938, the Court of Appeals said (p. 237):

> "In the Act, Congress has made this court the sole appellate body (with right to petition for certiorari to the Supreme Court) whereby the action of the Commission can be tested and has provided that any party aggrieved may have its rights reviewed here. It is well settled that the exclusive remedy provided by the statute to test the Commission's action is vested in this court by appeal, from which it follows that other courts do not grant equitable relief in such cases."

In the meantime, in a large number of cases taken before the Court of Appeals by the route provided in the original Section 16, in the amended Section 16 of the Radio Act prior to 1934, and in Section 402(b) since then, the validity of regulations of the Commission has been questioned, considered, and discussed. This was true of *Federal Radio Commission* v. *Nelson Bros. Bond & M. Co.*, 289 U. S. 266, 281.

It was also true of *General Electric Co.* v. *Federal Radio Commission*, 31 F. 2d. 630 (cert. dismissed 281 U. S. 464); *Carrell* v. *Federal Radio Commission*, 36 F. 2d. 117; *Chicago Federation of Labor* v. *Federal Radio Commission*, 41 F. 2d. 422, 423; *Courier-Journal Co.* v. *Federal Radio Commission*, 46 F. 2d. 614; *Durham Life Ins. Co.* v. *Federal Radio Commission*, 55 F. 2d. 537; *Pacific Development Radio Co.* v. *Federal Radio Commission*, 55 F. 2d. 540; *Eastland Co.* v. *Federal Communications Commission*, 92 F. 2d. 467, 471-2; *Pittsburgh Radio Supply House* v. *Federal Communications Commission*, 98 F. 2d. 303, 306; *Woodmen of the World Life Ins. Soc.* v. *Federal Communications Commission*, 105 F. 2d. 75, 78; *Colonial Broadcasters, Inc.* v. *Federal Communications Commission*, 105 F. 2d. 781; *Tri-State Broadcasting Co.* v. *Federal Communications Commission*, 107 F. 2d. 956, 958; and *Ward* v. *Federal Communications Commission*, 108 F. 2d. 486, 490-1. Many appeals have been taken under these provisions, approximately 44 before July 1, 1934 and 39 since then, by many different persons and interests, represented by a number of different lawyers. Those dissatisfied with the workings of the statute have never hesitated to make known their criticisms and suggestions in the Congressional hearings on the subject of radio which have taken place not less than an average of once every two years since 1923. Never once prior to 1934 was any suggestion made that the Radio Act of 1927 was defective in not providing for direct judicial review over the Commission's orders adopting regulations in the field of radio. Never once since then (until now) has anyone deemed Section 402(a) applicable to such an order.

The salient fact in this history is that, when the Radio Act was merged into Title III of the Communications Act, it provided no such remedy. Its procedural provisions were entirely built on, and related to, hearings on applications, revocations and appeals from orders resulting therefrom. Nowhere in Title III is any hearing required as prerequisite to the adoption of a regulation, with an irrelevant excep-

tion made in Section 303(f)[8]. Nowhere is there the slightest implication that, if hearings are held prior to adopting regulations, they should be on the quasi-judicial model. Throughout, there is a studied contrast between actions on applications (or revocations) and the adoption of regulations.

D. Nature of the orders involved.

The regulations of the Federal Communications Commission constitute Title 47 of the Code of Federal Regulations of the United States and, as of June 1, 1938, occupied almost an entire separate volume, with a total of 478 out of 487 pages. Its regulations account for 78 pages in the 1938 Supplement and 257 pages of fine print in the 1939 Supplement. Since then a large number of further regulations have been issued, covering a variety of subjects in the rapidly advancing radio art, with special reference to such matters as television, high frequency broadcasting, including frequency modulation, and many others. They are constantly being supplemented, and are available in pamphlet form in an impressive series of pamphlets covering separate subjects (see list in 7th Ann. Rep. of FCC, 1941, p. 66).

Reference to the 1939 Supplement will sufficiently serve to reveal the character of the regulations. Of the 257 pages, the first 28 have to do with practice and procedure, and a portion of the last 26 have to do with common carrier matters, principally the filing of contracts and periodic reports, and rules governing tariffs, and much of that is procedural. Virtually all the remaining pages are filled with regulations of a substantive character, sometimes expressed in the form of outright prohibitions or commands, and just as frequently (if not more so) in the form of policy declarations like the regulations now complained of.

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[8] Changes in the frequencies, authorized power, or times of operation, without the consent of the licensee, are made subject to hearing. This is simply the counterpart of Section 312(b).

A substantial portion of the regulations are required by treaties to which the United States is a party. Examples of such treaties are the North American Regional Broadcasting Agreement (Treaty Series 962), signed at Havana, 1937, the International Telecommunications Convention (Treaty Series 867), signed at Madrid, 1932, and the General Radio Regulations (Treaty Series 948), signed at Cairo, 1938. Further regulations are required by international arrangements of an executive character, constantly being made between the administrative authorities of the several countries, usually pursuant to provisions in the treaties and the obligations imposed thereby.

The limited number of common carriers subject to the Commission's jurisdiction is indicated by the fact that 216 companies filed annual reports, and 115 of these filed monthly reports, for the year 1940, including a number of telephone carriers that are not subject to the complete jurisdiction of the Commission. Of the 115, 98 were telephone carriers, 8 were wire-telegraph or ocean-cable carriers, and 9 were radiotelegraph carriers (7th Ann. Rep., 1941, p. 64).

In contrast with these figures; there were, as of June 30, 1941, 1,545 radio stations belonging to the broadcasting and related classifications (television, high frequency, international, facsimile, etc.), 12,632 radio stations of other services (aviation, ship, police, fire, point-to-point, coastal, geological, etc.), and over 50,000 amateur licenses (7th Ann. Rep., 1941, pp. 52, 62, 63). The foregoing are in addition to approximately 80,000 radio operator licenses, the operators being, of course, all subject to the Commission's licensing authority and regulations (*ibid.*, p. 50).

Under Section 606(c) of the Act, upon proclamation by the President of war or other national emergency,

> "the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the Commission."

Under Section 305(a), Government stations, with immaterial exceptions,

> "shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the Commission may prescribe."

Under Section 312(a)

> "Any station license may be revoked * * * for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States * * *."

Under Section 502, wilful and knowing violation of any of the Commission's rules or regulations is made a penal offense. Under Section 303(m), the Commission may, after hearing, suspend the license of any operator for violation of any of the Commission's regulations. When these provisions are considered in conjunction with the quasi-judicial provisions for hearings on applications under Sec. 309(a), there is certainly no lack of a forum in which to contest the Commission's legislative determinations.

The many clauses in Section 303 contain the bulk of the Commission's regulation-making powers. There are, however, additional powers of this character in Sections 4(i), 308(b), 315, 319(a), and 325(c). The only standard imposed by Congress on the Commission as a guide is the broad test of "public convenience, interest or necessity" in the introductory portion of Section 303. The broad dimensions of these powers, both in subject-matter and in standard, are in striking contrast to the few and narrowly-defined regulation-making powers conferred by Title II, and by the other statutes to which the Urgent Deficiencies Act has been made applicable. The standard "public convenience, interest or necessity," taken with the subject-matter, admits and requires a large measure of discretion in a highly technical and rapidly advancing scientific art, in which not only the contents but the boun-

daries of the discretion will be difficult to discover except in the framework of a concrete application of the Commission's policy in a particular case.

In arriving at its legislative determinations the Commission has, over the years, employed all the usual methods for the securing of information, including investigations in the field (which, in turn, have included countless thousands of observations and measurements with technical apparatus), questionnaires, data exchanged with foreign countries, conferences with interested groups and experts, informal hearings, and formal hearings. The hearing in the instant case, resulting in a record of 8,713 pages and 707 exhibits, while of course larger than the average, is only one of a number of huge records built up in such proceedings where they have been held.

In none of these matters was a hearing required by statute. The same determinations could have been made on the basis of information secured by informal methods (as it has been in other important sets of regulations adopted by the Commission), with no record setting forth the considerations and facts leading to the result. Under present conditions, indeed, it would not be proper to make some of the considerations public; and yet very important legislative enactments are being made from week to week, seriously affecting the persons subject to the Commission's regulatory powers.

In the court below, counsel for appellants clearly indicated that it was their conception of the review accorded by Section 402(a) that it permitted a complete factual showing by appellants in support of the claim that the Commission had exceeded its powers and in so doing had deprived appellants of their rights. It is difficult to conceive of any factual showing which would not duplicate, in whole or in part, the record made before the Commission in this case and, if any important facts are lacking in that record, it can only be due to appellants' failure to present all the available material evidence to the Commission.

Suppose, however, there had been no hearing and there were no formal record? Is the door to be thrown open to an extended judicial hearing of the sort sought by appellants? Once such a review is permitted, within what limits can it be confined? How can suits brought under Section 402(a) be prevented from becoming an effective weapon to subject the Commission's regulations to interminable delays, and to countrywide diversities of judicial rulings?

CONCLUSION.

It is submitted that the judgments of the district court should be affirmed.

Respectfully,

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APPENDIX.

THE COMMUNICATIONS ACT OF 1934

(47 U. S. C. §§ 151 *et seq.*)

TITLE I.

GENERAL PROVISIONS.

* * * * * * * * * * *

"§ 154. Federal Communications Commission; composition and provisions relating thereto generally

* * * * * * * * * * *

"(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."

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TITLE II.

COMMON CARRIERS.

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TITLE III.

PROVISIONS RELATING TO RADIO,

Part I. General Provisions.

* * * * * * * * * * *

"§ 303. Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual sta-

tion and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has wilfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been

given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

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"§ 305. Government owned stations; regulations; stations on vessels; call letters

(a) Radio stations belonging to and operated by the United States shall not be subject to the provisions of sections 301 and 303 of this chapter. All such Government stations shall use such frequencies as shall be assigned to each or to each class by the President. All such stations, except stations on board naval and other Government vessels while at sea or beyond the limits of the continental United States, when transmitting any radio communication or signal other than a communication or signal relating to Government business, shall conform to such rules and regulations designed to prevent interference with other radio stations and the rights of others as the Commission may prescribe."

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"§ 308. Same (licenses); application; conditions and restrictions in license for foreign communication

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(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership

and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation."

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"§312. Same (licenses); revocation and modification; notice and hearing

(a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this chapter or of any regulation of the Commission authorized by this chapter or by a treaty ratified by the United States: *Provided; however*, That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may

prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation."

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"§315. Candidates for public office; facilities.

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate."

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"§ 319. Construction permits; licenses for operation

(a) No license shall be issued under the authority of this chapter for the operation of any station the construction of which is begun or is continued after this chapter takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected

to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation."

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"§ 325. False distress signals; rebroadcasting programs; studios for broadcasting to foreign countries for rebroadcasting to United States; permit

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(b) No person shall be permitted to locate, use, or maintain a radio broadcast studio or other place or apparatus from which or whereby sound waves are converted into electrical energy, or mechanical or physical reproduction of sound waves produced, and caused to be transmitted or delivered to a radio station in a foreign country for the purpose of being broadcast from any radio station there having a power output of sufficient intensity and/or being so located geographically that its emissions may be received consistently in the United States without first obtaining a permit from the Commission upon proper application therefor.

(c) Such application shall contain such information as the Commission may by regulation prescribe, and the granting or refusal thereof shall be subject to the requirements of section 309 hereof with respect to applications for station licenses or renewal or modification thereof, and the license or permission so granted shall be revocable for false statements in the application so required or when the Commission, after hearings, shall find its continuation no longer in the public interest."

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PART II. RADIO EQUIPMENT AND RADIO OPERATORS ON BOARD SHIP

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TITLE IV.

PROCEDURAL AND ADMINISTRATIVE PROVISIONS

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TITLE V.

PENAL PROVISIONS: FORFEITURES

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"§ 502. Violation of rules, regulations, etc.

Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

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TITLE VI.

MISCELLANEOUS PROVISIONS

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" § 606. War powers of President

(c) Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the Commission, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners."

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SUPREME COURT OF THE UNITED STATES.

No. 1025—October Term, 1941.

National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, Appellants, *vs.* The United States of America, Federal Communications Commission and Mutual Broadcasting System, Inc.	Appeal from the District Court of the United States for the Southern District of New York.

[June 1, 1942.]

Mr. Chief Justice Stone delivered the opinion of the Court.

This is a companion case to No. 1026, *Columbia Broadcasting System, Inc.* v. *United States*, decided this day. Both present substantially similar facts and the same issues of law.

Appellant, National Broadcasting Company, maintains two radio broadcasting systems, the "blue network" and the "red network". The two other appellants operate radio broadcasting stations licensed by the Communications Commission, and have entered into contracts with National similar to those involved in the *Columbia* case and to those of other stations which participate in National's networks.

Appellants brought the present suit in the Southern District of New York to set aside the order of the Commission of May 2, 1941, as amended by its order of October 11, 1941, promulgating the Chain Broadcasting Regulations which we considered in the *Columbia* case, on the grounds that the order is beyond the Commission's statutory authority or, if within it, that the statute is an unconstitutional delegation of the legislative power of Congress in violation of Article I, § 1 of the Constitution, and operates to deprive appellants of property without the due process of law guaranteed by the Fifth Amendment.

The district court of three judges dismissed the complaint, — F. Supp. —, holding that the Commission's order is not reviewable under the provisions of § 402(a) of the Communications Act of

1934, 48 Stat. 1093, 47 U. S. C. § 402(a), and the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. § 47, but stayed the operation of the order pending direct appeal to this Court.

According to the allegations of the bill of complaint, National conducts its broadcasting business in substantially the same manner as Columbia. It establishes telephone wire connections with licensed broadcasting stations with which it enters into contracts for limited periods for chain broadcasting of its radio programs. These contracts do not require that the station shall broadcast the programs of no other chain than National. But a feature of them is the option given to National for use of the station on 28 days' notice for certain specified periods of radio time in broadcasting commercial network programs provided by National. It is alleged that because of the contract provisions the regulations will require the stations affiliated with National to abandon their contracts or lose their licenses either by the Commission's cancellation of or refusal to renew them. The bill of complaint makes a sufficient showing of irreparable injury to National, including an allegation that forty-eight affiliated stations have served notice of abrogation of the contracts.

For the reasons stated at length in the opinion in the *Columbia* case, we hold that the order of the Commission is reviewable in the present suit by the district court of three judges. The bill of complaint states a cause of action in equity. The judgment will accordingly be reversed and the cause remanded for further proceedings.

Unlike the *Columbia* case, the record discloses no facts showing what effect the Commission's minute adopted after the present suit was brought has had or will have upon the cancellation of appellants' contracts by the affiliated stations. So far as relevant that will be a matter for consideration by the court below, as will be the question, not considered here, whether the appellants other than National are proper parties plaintiff.

As in the *Columbia* case the stay now in effect will be continued, on terms to be settled by the court below.

Reversed.

Mr. Justice BLACK took no part in the consideration or decision of this case.

Mr. Justice REED, Mr. Justice FRANKFURTER and Mr. Justice DOUGLAS dissent for the reasons set forth in the dissenting opinion in No. 1026.